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C O N F I D E N T I A L SECTION 01 OF 02 TEL AVIV 002715

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E.O. 12958: DECL: 08/30/2017
TAGS: [IS](#) [KPAL](#) [KWBG](#) [PGOV](#) [PREL](#)
SUBJECT: HCJ UPHOLDS RETROACTIVE LEGALIZATION OF ILLEGAL
SETTLEMENT CONSTRUCTION

REF: A. TEL AVIV 02670

[1](#)B. TEL AVIV 02630

Classified By: Ambassador Richard H. Jones for reasons 1.4 (b), (d)

[1](#)1. (C) Summary: On September 5, the Israeli High Court of Justice (HCJ) upheld the GOI's retroactive approval of illegal settlement construction in the Mattityahu East settlement, located in the Modi'in Illit settlement bloc north-west of Jerusalem. The Court rejected petitions by Peace Now and Palestinians from the adjacent village of Bil'in requesting the demolition of apartments built at the site. The petitioners claimed that this construction lacked the proper building permits and was therefore illegal. Although the Court acknowledged that the construction was commenced illegally, it said that Civil Administration's retroactive legalization of the construction invalidated the basis of the petition. Although disappointed, embassy contacts told econoff that they are not surprised with the HCJ's decision. They noted that the two rulings this week signaled an HCJ attempt to reach a pragmatic compromise that would not upset overall public opinion by forcibly evacuating more than 1,000 squatters; to provide a economic horizon for Bil'in residents by returning some of their land; and to enable the settlers to also come away with a victory by not canceling all of the housing planned for Mattityahu East. This decision, in conjunction with the HCJ's Tuesday ruling, which indicated that the GOI must reroute part of the West Bank separation barrier near Bil'in, will result in the retroactive legalization of some 1,900 (of 3,000 planned) housing units. End summary.

This Week's HCJ Rulings

[1](#)2. (C) On September 4 and 5, the HCJ issued two decisions regarding petitions filed against unauthorized construction in the Mattityahu East settlement and the separation barrier's route in this area. The two decisions will result in the retroactive legalization of approximately 1,900 housing units already under construction or completed; the probable cancellation of plans to build 1,100 housing units for which construction has not yet commenced; and the rerouting of the barrier to return approximately 272 acres to the Palestinian village of Bil'in.

[1](#)3. (C) On Tuesday, September 4, the Court ruled that the separation barrier, which was designed to include the western and eastern areas of Mattityahu East, would be rerouted to bisect the settlement's neighborhoods. The decision returned

272 acres -- about half of the Bil'in land taken from the village by the barrier -- to the village (ref a). Due to the Court's decision, it is unlikely that Defense Minister Barak will uphold plans to build the planned 1,100 housing unit settlement expansion, since it will be outside the barrier.

14. (C) On Wednesday, September 5, the HCJ upheld the GOI's retroactive approval of the unauthorized planning and construction in Mattityahu East. The Court rejected petitions by Peace Now and Bil'in Palestinians claiming that this construction project -- consisting of some 3,000 housing units -- was illegal because it lacked the proper permits. The Court ruled that the Civil Administration's retroactive approval of the project "cured the flaws in the first process" and repudiated the basis of the petitions' complaint. According to the HCJ ruling, the housing units built in Mattityahu East need not be dismantled. The Court further said that the destruction of these units would be a "disproportionate" sanction that would hurt "innocent buyers" (ref b). This September 5 decision upholds the construction of some 1,900 housing units -- 400 completed, 1,500 in various stages of construction. Essentially, via its rulings, the Court decided that the units that had been under construction or completed will remain (1,900 units), while the unbuilt expansion (1,100) will not likely be built.

Creative Rulings Reach Compromise

16. (C) Michael Sfard, lawyer for Peace Now and Bil'in Palestinians, expressed disappointment at the September 5 HCJ ruling, but noted that he was not surprised with the outcome. He asserted that the HCJ decision was political and that the

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Court dismissed his clients' claims based on speculative arguments. According to Sfard, the Court stated that his clients should have petitioned against the original housing plan in 1999, and therefore, their petition exceeded the statute of limitations. Sfard noted to econoff, however, that the village of Bil'in primarily consists of farmers who do not have access to Israeli lawyers and are not regularly informed about settlement building plans. He said that Bil'in residents did not know of the planned housing project in Mattityahu East until the barrier's route threatened to annex their agricultural land. (Note: As the petitioners' attorney, Sfard is not a disinterested party in this case and we cannot vouch for the veracity of his statements. However, if Sfard's claim of the Court's argument is accurate, it would have been impossible for Bil'in residents to petition against the settlement's building plans in 1999. The original plan allowed for the construction of only 1,500 housing units. Unapproved construction in Mattityahu East of 3,000 housing units in the settlement did not commence until late 2003/early 2004. No settlement construction had commenced -- in accordance with, or in violation of -- the original planning documents in 1999. In addition, the GOI did not start construction of the West Bank barrier until 2002. End note.)

17. (C) Peace Now Director General Yariv Oppenheimer described the Court decisions as a "compromise." According to Oppenheimer, although the project was illegal -- thus leading the Civil Administration to retroactively approve its planning and construction -- he also was not surprised with the HCJ's decision. Oppenheimer speculated that legality was not the primary concern for the judges, and added that the HCJ found a "creative solution for what it wanted to achieve." Oppenheimer noted that the decisions appease all by: not upsetting greater Israeli public opinion by forcibly evacuating more than 1,000 people; providing a economic horizon for Bil'in residents by returning some of their land; and enabling the settlers to also come away with a victory by not canceling all of the housing planned for Mattityahu East.

He speculated that the decisions enabled a compromise solution that would allow the HCJ to maintain its credibility with all sectors of the Israeli public.

Comment:

18. (C) As Sfard and Oppenheimer are both interested parties in this case, we will also try to follow up with Chief Justice Dorit Beinisch or another member of the HCJ to hear their views on how this case was decided and why.

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JONES